



## Social Media in Rulemaking

### Committee on Rulemaking

Proposed Recommendation | December 5-6, 2013

#### Proposed Amendments

**This document displays manager’s amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).**

1            In the last decade, the notice-and-comment rulemaking process has changed from a  
2 paper process to an electronic one. Many anticipated that this transition to “e-Rulemaking”<sup>1</sup>  
3 would precipitate a “revolution,” making rulemaking not just more efficient, but also more  
4 broadly participatory, democratic, and dialogic. But these grand hopes have not yet been  
5 realized. Although notice-and-comment rulemaking is now conducted electronically, the  
6 process remains otherwise recognizable and has undergone no fundamental transformation.

7            At the same time, the Internet has continued to evolve, moving from static, text-based  
8 websites to dynamic multi-media platforms that facilitate more participatory, dialogic activities  
9 and support large amounts of user-generated content. These “social media” broadly include  
10 any online tool that facilitates two-way communication, collaboration, interaction, or sharing  
11 between agencies and the public. Examples of social media tools currently in widespread use  
12 include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing<sup>2</sup> platforms. But

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<sup>1</sup> The Conference has previously defined “e-Rulemaking” as “the use of digital technologies in the development and implementation of regulations before or during the informal process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA).” Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011) (internal quotation marks and footnote omitted).

<sup>2</sup> “Crowdsourcing” is an umbrella term that includes various techniques for distributed problem-solving or production, drawing on the cumulative knowledge or labor of a large number of people. Wikipedia, the development of the Linux operating system, Amazon.com’s “Mechanical Turk” platform, and public and private challenges that award a prize to the best solution to a particular problem are all examples of crowdsourcing.

13 technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools  
14 so familiar to us today will grow or fade into obsolescence, while new tools emerge.<sup>3</sup>

15 The accessible, dynamic, and dialogic character of social media makes it a promising set  
16 of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program  
17 Management Office, which operates the federal government’s primary online rulemaking  
18 portal, Regulations.gov, has urged agencies to “[e]xplore the use of the latest technologies, to  
19 the extent feasible and permitted by law, to engage the public in improving federal decision-  
20 making and help illustrate the impact of emerging Internet technologies on the federal  
21 regulatory process.”<sup>4</sup> The Conference has similarly, albeit more modestly, recommended that  
22 “[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the  
23 visibility of rulemakings.”<sup>5</sup>

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<sup>3</sup> One type of emerging technology includes structured argumentation tools. These tools may take the form of, for example, interactive feedback forms that ask direct and progressively more focused questions in sequence or in response to input, thereby generating more targeted and substantively useful input from users.

<sup>4</sup> E-RULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), available at [http://exchange.regulations.gov/exchange/sites/default/files/doc\\_files/20101130\\_eRule\\_Best\\_Practices\\_Document\\_rev.pdf](http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf).

<sup>5</sup> Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012). The Conference has consistently supported full and effective public participation in rulemaking, as well as the use of new technologies to enhance such participation. In Recommendation 95-3, *Review of Existing Agency Regulations*, the Conference encouraged agencies to “provide adequate opportunity for public involvement in both the priority-setting and review processes,” including by “requesting comments through electronic bulletin boards or other means of electronic communication.” 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

24 Federal agencies have embraced social media to serve a variety of non-rulemaking  
25 purposes,<sup>6</sup> but few have experimented with such tools in the rulemaking context. One  
26 explanation for this reluctance is uncertainty about how the Administrative Procedure Act  
27 (APA) and other requirements of administrative law apply to the use of social media,  
28 particularly during the process governed by the APA's informal rulemaking requirements,  
29 beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the  
30 comment period, and until the agency issues a final rule.<sup>7</sup> In particular, agencies are uncertain  
31 whether public contributions to a blog or Facebook discussion are "comments" for purposes of  
32 the APA, thus triggering the agencies' obligations to review and respond to the contributions  
33 and include them in the rulemaking record. Other concerns include how the Paperwork  
34 Reduction Act applies to agency inquiries through social media,<sup>8</sup> whether the First Amendment  
35 might limit an agency from moderating a social media discussion, and how individual agencies'  
36 "ex parte" communications policies might apply to the use of social media.

37 Apart from legal concerns are doubts as to whether, when, and how social media will  
38 benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap.  
39 First, can social media be used to generate more useful public input in rulemaking? Second, is

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<sup>6</sup> For example, agencies have enthusiastically embraced social media, including Facebook and Twitter, as an effective tool for pushing information out to the public, from general information about an agency and its mission to more specific notifications of services, benefits, or employment opportunities that are available from an agency. Agencies have also used social media in more interactive ways, such as when nearly three dozen agencies used Ideascale to engage the public in the process of developing the agencies' Open Government Plans, or to collect metadata, such as when the Consumer Financial Protection Bureau used metadata generated by a "heat map" to better understand how consumers would react to different proposed versions of a disclosure form. "heat maps" generated from click-based online user reviews of prototype disclosure forms to illustrate which sections of the forms elicited the strongest reactions.

<sup>7</sup> The Conference recently addressed legal issues related to e-rulemaking in Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, see *supra* note 1, but did not delve into the unique concerns that arise when agencies use social media to support rulemaking activities.

<sup>8</sup> The Office of Management and Budget has issued helpful guidance on these issues. See Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Independent Regulatory Agencies regarding Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf).

40 increased lay participation in rulemaking likely to be valuable? Experience suggests that both  
41 the quality of comments and the level of participation in social media discussions are often  
42 much lower than one might hope. A third-party facilitator may be able to help an agency  
43 address these issues by encouraging public participation, helping participants understand the  
44 rulemaking process and the agency's proposal, asking follow-up questions to produce more  
45 substantive input, and actively facilitating engagement among participants. Regardless of  
46 whether a third-party facilitator is used, however, creating the conditions necessary to foster a  
47 meaningful, productive dialogue among participants requires commitment, time, and  
48 thoughtful design. Since this kind of innovation can be costly, agencies are understandably  
49 reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also face a  
50 variety of practical questions. One such question is whether to require participants to identify  
51 themselves in agency-sponsored social media discussions. Another concern is that the use of  
52 ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow  
53 some participants to improperly manipulate the discussion.

54 Social media can be valuable during the notice-and-comment phase of rulemaking, but  
55 on a selected basis. For example, if an agency needs to reach an elusive audience or determine  
56 public preferences or reactions in order to develop an effective regulation, social media may  
57 enable the collection of information and data that are rarely reflected in traditional rulemaking  
58 comments. Success requires an agency to thoughtfully identify the purpose(s) of using social  
59 media, carefully select the appropriate social media tool(s), and integrate those tools into the  
60 traditional notice-and-comment process. In addition, agencies must clearly communicate to the  
61 public how the social media discussion will be used in the rulemaking. Although the APA allows  
62 agencies the flexibility to be innovative, attention should be given to how the APA or other legal  
63 requirements will apply in the circumstances of a particular rulemaking.

64 Agencies may find, however, that it is both easier and more often valuable to use social  
65 media in connection with rulemaking activities, but outside the notice-and-comment process.  
66 For example, social media can be effective for public outreach, helping to increase public  
67 awareness of agency activities, including opportunities to contribute to policy setting, rule

68 development, or the evaluation of existing regulatory regimes. The use of social media may  
69 also be particularly appropriate during the pre-rulemaking or policy-development phase. Here,  
70 the APA and other legal restrictions do not apply, and agencies are often seeking dispersed  
71 knowledge or answers to more open-ended questions that lend themselves to productive  
72 discussion through social media. For the same reasons, social media may be an effective way  
73 for agencies to seek input on retrospective review of existing regulations. It also may be helpful  
74 in connection with a negotiated rulemaking,<sup>9</sup> where these tools may make it easier for the  
75 diverse interests to collaborate during and between meetings on a solution to the problem  
76 being addressed.

77 This recommendation provides guidance to agencies on whether, how, and when social  
78 media might be used both lawfully and effectively to support rulemaking activities. It seeks to  
79 identify broad principles susceptible of application to any social media tool that is now available  
80 or may be developed in the future. It is intended to encourage innovation and facilitate the  
81 experimentation necessary to develop the most effective techniques for leveraging the  
82 strengths of social media to achieve the promises of e-Rulemaking.

## RECOMMENDATION

83 1. Agencies should explore in the rulemaking process the use of social media—online  
84 platforms that can provide broad opportunities for public consultation, discussion, and  
85 engagement.

### 86 **Public Outreach**

87 2. Agencies should use social media to inform and educate the public about agency  
88 activities, their rulemaking process in general, and specific rulemakings. Agencies should take  
89 an expansive approach to alerting potential participants to upcoming rulemakings by posting to  
90 the agency website and sending notifications through multiple social media channels. Social

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<sup>9</sup> See, e.g., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations* (Dec. 13, 1985).

91 media may provide an more effective means to reach interested persons who have traditionally  
92 been underrepresented in the rulemaking process (including holders of affected interests that  
93 are highly diffused).

94 3. Agencies should recognize that raising awareness among missing stakeholders (those  
95 directly affected by the proposed rule who are historically unlikely to participate in the  
96 traditional comment process) and other potential new participants in the rulemaking process  
97 will require new outreach strategies beyond simply giving notice in the *Federal Register*,  
98 Regulations.gov, and the agency website. Social media may be particularly effective for  
99 successful outreach, and agencies using it for this purpose in connection with rulemaking  
100 should consider:

101 (a) Developing one or more communications plans specifically tailored to the rule and  
102 to all types of missing stakeholders or other potential new participants the agency is  
103 trying to engage. These plans should be evenhanded and designed to encourage all  
104 types of stakeholders to participate.

105 (b) In outreach messages, clearly explaining the mechanisms through which members  
106 of the public can participate in the rulemaking, what the role of public comments is, and  
107 how the agency will take comments into account.

108 (c) Encouraging public response by being clear and specific about how the proposed  
109 rule would affect the targeted participants and what input will be most useful to the  
110 agency.

111 (d) Asking all interested organizations to spread the participation message to members  
112 or followers. Agencies should be prepared to explain why individual participation can  
113 be beneficial, and to encourage organizations to solicit substantive, individualized  
114 comments from their members.

115 (e) Using multilingual social media outlets where appropriate.

116 4. The General Services Administration, the e-Rulemaking Program Management Office,  
117 and other federal agencies, either individually or (preferably) collaboratively, should use social  
118 media to create and distribute more robust educational programs about rulemaking. These  
119 efforts could include: producing videos about the rulemaking process and how to effectively  
120 participate through commenting and posting on an agency website or video-sharing website;  
121 hosting webinars in which agency personnel discuss how to draft useful and helpful comments;  
122 maintaining an online database of exemplary rulemaking comments; or conducting an online  
123 class or webinar or providing explanatory materials in which officials review a draft comment  
124 and suggest ways to improve it.

125 5. Agencies should explore ways to publicize, and allow members of the public to  
126 receive, regular, automated updates on developments in, at a minimum, significant  
127 rulemakings.

128 6. Agencies should consider using social media prior to the publication of an NPRM or  
129 proposed policy where the goal is to understand the current state of affairs, collect dispersed  
130 knowledge, or identify problems. To enhance the amount and value of public input, an agency  
131 seeking to engage the public for these purposes should, to the maximum extent possible, make  
132 clear the sort of information it is seeking and how the agency intends to use public input  
133 received in this way. The agency should also directly engage with participants by  
134 acknowledging submissions, asking follow-up questions, and providing substantive responses.

135 7. Agencies should consider using social media in support of retrospective review of  
136 existing regulations, particularly to learn what actual experience has been under the relevant  
137 regulation(s).

138 **Using Social Media in Notice-and-Comment Rulemaking**

139 8. Although the use of social media may not be appropriate and productive in all  
140 rulemakings, agencies may use social media to supplement or improve the traditional  
141 commenting process. Before using social media in connection with a particular rulemaking,

142 agencies should identify the specific goals they expect to achieve through the use of social  
143 media and carefully consider the potential costs and benefits.

144 9. Agencies should use the social media tools that best fit their particular purposes and  
145 goals and should carefully consider how to effectively integrate those tools into the traditional  
146 rulemaking process.

147 **Effective Approaches for Using Social Media in Rulemaking**

148 10. For each rulemaking, agencies should consider maintaining a blog or other  
149 appropriate social media site dedicated to that rulemaking for purposes of providing  
150 information, updates, and clarifications regarding the scope and progress of the rulemaking.  
151 Agencies may also wish to explore using such a site to generate a dialogue.

152 11. When an agency sponsors a social media discussion in connection with a notice-  
153 and-comment rulemaking, it should determine and prominently indicate to the public how the  
154 discussion will be treated under the APA (for administrative record purposes). The agency may  
155 decide, for example:

156 (a) To include all comments submitted via an agency-administered social media  
157 discussion in the rulemaking record. Agencies should consider using an application  
158 programming interface (API) or other appropriate technological tool to efficiently  
159 transfer content from social media to the rulemaking record.

160 (b) That no part of the social media discussion will be included in the rulemaking  
161 docket, that the agency will not consider the discussion in developing the rule, and that  
162 the agency will not respond to the discussion. An agency that selects this option should  
163 communicate the restriction clearly to the public through conspicuous disclaimers on  
164 the social media site itself, provide instructions on how to submit an official comment to  
165 the rulemaking docket, and provide a convenient mechanism for doing so. It is  
166 especially important in these circumstances that the agency clearly explain the purpose  
167 of a social media discussion the agency does not intend to consider in the rulemaking.

168           12. When soliciting input through a social media platform, agencies should provide a  
169 version of the NPRM that is “friendly” and clear to lay users. This involves, for example,  
170 breaking preambles into smaller components by subject, summarizing those components in  
171 plain language, layering more complete versions of the preamble below the summaries, and  
172 providing hyperlinked definitions of key terms. In doing this, the agency should either:

173           (a) Publish both versions of the NPRM in the *Federal Register*; or

174           (b) Cross-reference the user-friendly version of the NPRM in the published NPRM and  
175 cross-reference the published NPRM in the user-friendly version of the NPRM.

176           13. Agencies should consider, in appropriate rulemakings, retaining facilitator services  
177 to manage rulemaking discussions conducted through social media. Appropriate rulemakings  
178 may include those in which:

179           (a) Targeted users are inexperienced commenters who may need help to prepare an  
180 effective comment (e.g., providing comments that give reasons rather than just  
181 reactions); or

182           (b) The issues will predictably produce sharply divided or highly emotional reactions.

183           14. Agencies should realize that not all rulemakings will be enhanced by a  
184 crowdsourcing approach. However, when the issue to be addressed is the public or user  
185 response itself (e.g., when the agency seeks to determine the best format for a consumer  
186 notice), direct submission to the public at large may lead to useful information. In addition,  
187 agencies should consider encouraging, and being receptive to, comments from lay stakeholders  
188 with “situated knowledge” arising out of their real world experience.

189           15. Agencies should consider experimenting with collaborative drafting platforms, both  
190 internally and, potentially, externally, for purposes of producing regulatory documents.

191           16. If an agency chooses to use voting or ranking tools, the agency should explain to the  
192 public how it intends to use the input generated through those tools.

193 17. Agencies should use social media to notify and educate the public about the final  
194 agency action produced through a rulemaking.

195 18. In appropriate circumstances, agencies should also use social media to provide  
196 compliance information. For example, an agency might use social media to inform and educate  
197 the public about paperwork requirements associated with a rule or the availability of regulatory  
198 guidance.

Comment [A1]: Fuchs/Staff Amendment

199 19. Agencies should collaborate to identify best practices for addressing issues that  
200 arise in connection with the use of social media in rulemaking.

#### 201 **Direct Final Rulemaking**

202 20. Agencies should consider using social media before or in connection with direct final  
203 rulemaking to quickly identify whether there are significant or meaningful objections that are  
204 not initially apparent.

#### 205 **Key Legal Considerations**

206 21. Agencies have maximum flexibility under the APA to use social media before an  
207 NPRM is issued or after a final rule has been promulgated.

208 22. Agencies should consider how the First Amendment applies to facilitating or hosting  
209 social media discussions. Agencies should also, such as by making it clear through a posted  
210 comment policy that all discussions and comments on any given agency social media site will be  
211 moderated in a uniform, viewpoint-neutral manner. Through this posted policy, agencies may  
212 decide to define or restrict the topics of discussion, impose reasonable limitations to preserve  
213 decorum, decency, and prevent spam or, alternatively, terminate a social media discussion  
214 altogether.

215 23. Agencies that have “ex parte” contact policies for information obtained in  
216 connection with rulemaking should review those policies to ensure they address  
217 communications made through social media.